

In the Court of Appeals of the State of Alaska

Scott Groom,

Appellant,

v.

State of Alaska,

Appellee.

Court of Appeals No. **A-13288**

Order

Date of Order: **12/23/2020**

Trial Court Case No. **3AN-13-05483CR**

The Appellant, Scott Abraham Groom, is currently represented at public expense by Kelly Taylor, an attorney from the Public Defender Agency. Ms. Taylor asks this Court to remand this case for a representation hearing. Ms. Taylor explains that Mr. Groom has expressed dissatisfaction with the Agency and with Ms. Taylor's representation, and has expressed his intent to file his own pleadings. Ms. Taylor believes that a representation hearing is necessary for this Court to understand Mr. Groom's concerns and for Mr. Groom to understand his options on appeal. Ms. Taylor also requests that the briefing schedule be stayed until this issue is resolved.

Mr. Groom may be unhappy with his currently appointed attorney. But in this case, the Appellant's opening briefing was accepted by this Court on November 12, 2020. At this stage of the appeal, even if Mr. Groom represents himself, or is appointed or retains a new attorney, he or a new attorney will generally be limited to filing a reply brief — that is, a brief that counters or rebuts the State's brief, or further clarifies an argument made in Mr. Groom's opening brief. Neither Mr. Groom, nor a new attorney, is allowed to raise new arguments or claims of errors in a reply brief. Nor, as a general matter, at this stage of the appeal, except for filing a reply brief, will Mr. Groom or a new attorney be allowed to file other "pleadings" without first showing that good cause exists to do so.

In addition, if Mr. Groom is seeking a new court appointed counsel, Mr. Groom does not have the right to reject appointed counsel and have new counsel appointed at public expense in the absence of any showing of cause for that change. *See Mute v. State*, 123 P.3d 1081, 1088 (Alaska App. 2005). Although Mr. Groom may be dissatisfied, or disagree, with Ms. Taylor over which issues have been argued on appeal, or how those issues should have been argued, it is ultimately Ms. Taylor's duty, in the exercise of her best professional judgment, to decide how to brief the appeal. *See Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). The fact that Mr. Groom may disagree with Ms. Taylor's choices does not constitute a reason for removing her.

That said, Ms. Taylor's pleading indicates that Mr. Groom may now wish to represent himself in this appeal. But because he has a constitutional right to counsel to assist him in the appeal, unless and until he knowingly and intelligently waives that right, any legal proceedings in which he is not represented by counsel would be void. *See Johnson v. Zerbst*, 304 U.S. 458, 467-68 (1938) (holding that a deprivation of the right to counsel is equivalent to a lack of jurisdiction).

If Mr. Groom desires to represent himself, then the superior court must determine whether Mr. Groom is willing to enter a knowing and intelligent waiver of the right to counsel, and if so, whether he is capable of representing himself on appeal.

Accordingly, **IT IS ORDERED:**

1. Mr. Groom's case is remanded to the superior court to determine whether he seeks new appointed counsel. If Mr. Groom seeks new appointed counsel, the court must consider whether there is good cause to allow Ms. Taylor to withdraw from representing Mr. Groom, and, if so, to appoint new counsel to represent Mr. Groom

at public expense. If the superior court finds that there is no good cause to appoint new counsel at public expense, then Ms. Taylor shall continue to represent Mr. Groom, and the superior court shall inform this Court of these circumstances.

2. If Mr. Groom wishes to represent himself, the superior court shall conduct an inquiry to make sure that Mr. Groom understands the benefits of counsel and the dangers of representing himself, and to make sure that Mr. Groom is minimally competent to represent himself — i.e., that he is capable of presenting a comprehensible argument on appeal.

3. As a suggestion, the superior court might advise Mr. Groom of the following aspects of litigating an appeal:

A criminal defendant who wishes to represent himself on appeal should bear in mind that an appellate court can not re-weigh the evidence or re-determine the facts of his case. Rather, an appellate court can only decide whether errors of law or mistakes of procedure were committed during the trial court proceedings. Because of this, it is important for a person who is pursuing an appeal to have a working knowledge of criminal law and criminal procedure, as well as good legal research skills, so that they can find the statutes and court decisions that apply to their case. Attorneys have specialized training and experience in these matters, so it is usually better to have an attorney's assistance when pursuing an appeal.

In addition, it helps to have good writing skills — because, in an appeal, a person's arguments are presented to the court primarily in written briefs.

Moreover, the rules governing an appeal are often technical. Again, attorneys are generally familiar with these rules, or can discover them without much trouble, so it is usually better to have an attorney's assistance.

Finally, the appellant cannot raise issues or claims of error for the first time in a reply brief. The purpose of the reply brief is to respond to the arguments made by the appellee in its brief. If the appellant includes a legal issue in the reply brief that was not raised and argued in the opening brief or the appellee's brief, it will not be considered by the Court of Appeals.

4. If, after Mr. Groom is advised of the benefits of counsel and the dangers of self-representation, he still wishes to represent himself, and if the superior court concludes that Mr. Groom is at least minimally competent to do so, the superior court shall inform this Court of these circumstances. Mr. Groom will be allowed to represent himself in this appeal.

5. If, on the other hand, Mr. Groom decides not to represent himself, or if the superior court concludes that Mr. Groom is not minimally competent to pursue this appeal on his own, then Ms. Taylor shall continue to represent Mr. Groom (unless the superior court concludes that Mr. Groom is entitled to new counsel at public expense).

6. Because Mr. Groom has a constitutional right to the assistance of counsel on appeal, he must expressly and knowingly waive this right if he wishes to dismiss his court-appointed counsel and represent himself. Accordingly, if Mr. Groom is unable to make up his mind about whether to represent himself, this means that he has not waived his right to counsel, and Ms. Taylor shall continue to represent him in this appeal (unless the superior court concludes that Mr. Groom is entitled to new counsel at public expense).

7. If Mr. Groom wants to hire private counsel, then the superior court will give Mr. Groom sixty days to do so, and the superior court shall inform this Court of this circumstance. Under these circumstances, Ms. Taylor will not be permitted to withdraw until the retained attorney files a superceding entry of appearance in this Court.

8. The superior court's report on these matters shall be transmitted to this Court on or before January 20, 2021. Upon the superior court's notice to this Court, this deadline may be extended for good cause.

9. In remanding this case, this Court acknowledges that under the current limitations imposed because of the COVID-19 public health crisis, this hearing should be done telephonically if possible. If the hearing cannot be done telephonically, then the superior court shall inform this Court of this circumstance as soon as possible.

10. Based on the information currently before this Court, the motion to stay the briefing schedule is **DENIED**. This denial, however, is without prejudice, and either party may renew the motion if either party feels a stay is necessary because of the remand.

Entered under the authority of Chief Judge Allard.

Clerk of the Appellate Courts



Sarah Anderson, Deputy Clerk

cc: Court of Appeal Judges
Judge Saxby
Trial Court Appeals Clerk

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